SUPREME COURT OF THE UNITED STATES

* *

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

and

Appellant

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant

-vs-

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN, and on behalf of all others similarly situated; and

ANNA STUCK, Intervenor,

Appellees

* *

Docket No.
73-1095
73-1016

MOTION
FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

* *

Appellee ANNA STUCK asks leave to file the attached Motion to Affirm without pre-payment of costs and to proceed In Forma Pauperis pursuant to Rule 53.

The Appellee's Affidavit in support of this Motion is attached hereto.

Dated: January 24, 1974

Isadore Greenberg

ISADORE GREENBERG

Douglas A. Eldridge

DOUGLAS A. ELDRIDGE

ONONDAGA NEIGHBORHOOD LEGAL SERVICES, INC.
Attorneys for Appellees

633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

SUPREME COURT OF THE UNITED STATES

* *

LAVINE, et al,

Appellants

-vs-

SHIRLEY, et al,

Appellees

* *

Docket No. 73-1095
73-1016

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:
CITY OF SYRACUSE)

I, ANNA STUCK, being first duly sworn according to law, depose and say in support of my motion for leave to proceed without being required to pre-pay costs or fees:

1. I am the Appellee in the above entitled class action.

2. My four infant children and I are recipients of public assistance in the Aid for Dependent Children category.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I have been informed by my attorneys and believe myself that I am entitled to the redress sought in this action.

6. The nature of the case is briefly stated as follows:

I intervened in the instant action upon remand from this Court (409 U.S. 1052) which required the District Court to consider the validity of New York Social Services Law 101-a.

The Appellants had terminated my welfare payments on the

basis of N.Y.S.S.L. 101-a for my refusal to cooperate in non-support proceedings against the father of my youngest child.

The three-judge court determined that §101-a was invalid as was 18 N.Y.C.R.R. 369.2(f)(3)(ii)(e) which was the subject of Shirley v. Lavine when it was previously before this Court. The three-judge court additionally found the recently changed HEW Regulation 45 C.F.R. §233.90 did not compel a different result since the new regulation runs counter to the consistent construction placed on the Social Security Act by the Courts.

It is from the summary judgment declaring said regulation to be invalid and restraining the Department of Social Services from enforcing it that Appellants have appealed. Appellee brings this motion in order that she may be allowed to move for affirmance of the judgment below on the ground that the questions upon which this action depends are so unsubstantial as not to need further argument, and that the denial of retroactive payments below should be reversed, without pre-payment of costs or fees.

Anna Stuck
ANNA STUCK

Subscribed and sworn to
before me this 1st day
of January, 1974.

Douglas A. Eldridge

DOUGLAS A. ELDRIDGE
Notary Public in the State of New York
Onondaga County, [illegible]-5168918
My Commission Expires March 30, 19[illegible]

SUPREME COURT OF THE UNITED STATES

* *

LAVINE, et al, Appellants	*	Docket Nos. 73-1095, 73-1016
-vs-	*	
SHIRLEY, et al, Appellees	*	MOTION TO AFFIRM

* *

Appellee Anna Stuck moves the Court to affirm, on the merits, the judgment of the three-judge court for the Northern District of New York below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellee further moves that the order of the three-judge court be modified to allow the award of welfare benefits to Appellee Anna Stuck for the period dating from her wrongful denial to the present.

ONONDAGA NEIGHBORHOOD LEGAL SERVICES, INC.
ISADORE GREENBERG, of Counsel
DOUGLAS A. ELDRIDGE, of Counsel
Attorneys for Appellees
633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

TO: LOUIS J. LEFKOWITZ, ESQ.
Attorney General, State of New York
Albany, New York 12224

JOHN LA PARO, ESQ.
Chief Welfare Attorney
Onondaga County Department of Social Services
600 South State Street
Syracuse, New York 13202

SUPREME COURT OF THE UNITED STATES

* *

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant

-vs-

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN, and on behalf of all others similarly situated; and

ANNA STUCK, Intervenor,

Appellees

* *

BRIEF
IN SUPPORT OF
MOTION TO AFFIRM

* *

Docket No. 73-1016
73-1095

ONONDAGA NEIGHBORHOOD LEGAL SERVICES
ISADORE GREENBERG, of Counsel
DOUGLAS A. ELDRIDGE, of Counsel

Attorneys for Appellees

633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

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I

THE STATE STATUTE AND THE FEDERAL REGULATION INVOLVED

A. The State Statute

On remand from this Court the three-judge court was directed to examine its previous decision in the instant case in light of the passage of Chapter 687 of the 1972 Laws of New York (New York Social Services Law §101-a as amended). The three-judge court on remand found New York Social Services Law §101-a to be illegal, just as it had determined New York Social Services Regulation 369.2(f)(3)(ii)(e) to be when this case was first before it. The statute purported to require public assistance recipients to bring proceedings in court to compel apparently responsible relatives to provide support. Section 3 of the statute provides specifically that failure to cooperate in support or paternity proceedings will result in the non-eligibility of that recipient for further assistance or care.

B. The Federal Regulation

During the pendancy of the proceedings on remand, the United States Department of Health, Education and Welfare (HEW) announced a new NOLEO regulation, 45 CFR 233.90(b)(4). This regulation purported to draw a distinction between the termination of welfare assistance to a child and termination of assistance to the "uncooperative caretaker-relative". The regulation provided that assistance could not be terminated to the child but it could be terminated to the parent who refused to cooperate in

the filing of paternity or support actions. The court below found that this change in the federal regulations was without Congressional authority, that the new interpretation was in error, and that it should not be viewed as a guidepost to be followed judically.

II

THE PROCEEDING BELOW

As it had done when the case was initially before it, on remand the three-judge court chose to decide the matter on a statutory ground without reaching the constitutional issues raised. The court held that New York Social Services Law 101-a as amended was unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for Aid to Families with Dependent Children (AFDC). It relied on the Social Security Act (42 U.S.C. §602 et seq.) in reaching this conclusion. It was not pursuaded to hold otherwise by the promulgation of HEW's regulation 45 CFR 233.90(b)(4) since that regulation appeared to be a diametric change from the NOLEO provisions which have existed since 1951, and since federal courts have repeatedly and consistently construed the NOLEO regulations to proclude their use as conditions of eligibility, and since any change from that stance would have to come from Congressional action rather than administrative fiat. Thus the court granted summary judgment in favor of Anna Stuck and against defendants Lavine and Lascaris. It denied a class action since it appeared that Anna Stuck herself

was the only New York welfare recipient who was not covered by the injunction in Lewis v. Lavine, pending in the Southern District of New York (order of Judge Breiant, 72 Civ. 4249, May 15, 1973). Further, the three-judge court denied payment to Anna Stuck of the amounts due to her in welfare benefits from the time she was wrongfully denied public assistance on the basis of the illegal statute. The court felt constrained by the views of the Second Circuit concerning retroactive payments expressed in Rothstein v. Wyman, 467 F. 2nd 226 (2nd Cir. 1972); cert. denied, 411 U.S. 921, rehearing denied 411 U.S. 988 (1973).

III

ARGUMENT

This case presents no questions which were not previously decided by this Court when it affirmed the three NOLEO cases during the 1971 term. Juras v. Meyers, 404 U.S. 803 (1971), rehearing denied 404 U.S. 961; Carleson v. Taylor, 404 U.S. 980, (1971); and Weaver v. Doe, 404 U.S. 987 (1971). In each of those cases the Court affirmed the decisions of the three-judge courts which held that state NOLEO provisions which conditioned eligibility for AFDC on a recipient's participation in a paternity or non-support suit against a responsible relative conflicted with the Social Security Act and were therefore void. These cases were bottomed on the principals set forth in Townsend v. Swank:

> (I)n the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, the state eligibility

> standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. 404 U.S. 282, 286, 92 S.Ct. 502, 505 (1971).

In fifteen other cases, federal courts have upheld this principal.[1] New York State claims that a new wrinkle in her statute distinguishes it from the cases that have gone before and presents a substantial issue. The New York statute provides for the denial of public assistance to the mother but not to the child, if the mother fails to pursue the responsible relative. In Carleson v. Taylor, (supra) the NOLEO requirement was used as a condition of eligibility for both the child and the parent. In Juras v. Meyers, (supra), it is unclear as to whether both the child and the mother were terminated by the Oregon Executive Task Force Bulletin No. 9. It is plain, nonetheless, that at least the mother was terminated for her refusal to prosecute

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1. Doe v. Shapiro, 302 F.Supp. 761 (D.Conn. 1969), appeal dism'd 390 U.S. 488 (1970); Doe v. Harder, contempt, 310 F.Supp. 302 (D. Conn. 1970); Woods v. Miller, 318 F.Supp. 510 (W.D. Pa. 1970); Doe v. Schmidt, 330 F.Supp. 159 (E.D. Wisc. 1971); Galindo v. Vowell, (consent j'ment), Civ. 5A-71-CA-248 (W.D. Tex. 1971); Doe v. Wohlgemuth, (T.R.O.) Civ. Act. No. 1958 (W.D. Pa. 1971); Saiz v. Hernandez, 340 F.Supp. 165 (D. New Mex., 1972); Saddler v. Winstead, 332 F.Supp. 130 (N.D. Miss. 1971); Chee v. Graham, Civ. 70-532 Phx. WEC (D.Ariz. 1971); Doe v. Lavine, 347 F.Supp. 357 (S.D. N.Y. 1972); Lewis v. Lavine, __F.Supp.__ (S.D. N.Y. 1973); Doe v. Ellis, 350 F.Supp. 375 (D. S.C. 1972); Story v. Roberts, __F.Supp.__, (D.C. Fla. 1972); Doe v. Rampton, 366 F. Supp.189, (D.C. Utah, 1973); Doe v. Gillman,479 F.2nd 646 8th Cir. 1973), cert. filed 10/23/73; Godfrey v. Stanton, (N.D. Indiana 1973).

non-supporting relatives. Weaver v. Doe, (supra) dealt with another combination. In that case only the child was denied public assistance when the mother refused to sue the father. New York's wrinkle in cutting the mother and not the child is simply another combination of the same illegal condition of eligibility. Of course termination of the mother results in a decrease of monies available for the needs of the children. Even if the mother is not included in the grant she must use some of the money allegedly restricted to the use of the children to keep herself alive so that she can care for the children. See Doe v. Harder, (supra). Plainly this new combination does not save the New York statute from its basic vice. Whether mothers and/or children are declared ineligible, the regulation sets up an additional eligibility requirement not provided for by the Social Security Act. The wrinkle does not present a substantial question not already decided by the Court; it is merely one of the combinations of eligibility conditions prohibited by the Court's affirmances of Juras v. Meyers, Carleson v. Taylor, and Weaver v. Doe. Since affirmances by the Court are afforded the same authority as decisions on the merits, the questions that the Appellants attempt to raise have already been decided. Doe v. Hodgson, (2nd Cir. May 1, 1973); cert. filed August 14, 1973, under name Doe v. Brennan.

IV

THE NEW HEW REGULATION IS NOT A LEGAL GUIDEPOST TO BE FOLLOWED BY THE COURTS

The NOLEO provision first appeared in 1951 when Congress enacted a law designed to secure child support from absent parents.[2] Immediately following the enactment of this provision, HEW promulgated its interpretive regulation:

> The NOLEO amendment does not make the assistance agency responsible for requiring the applicant to take action against the deserting parent or for making eligibility for assistance conditioned upon action by the applicant...The public assistance job is seen as that of providing eligible children with assistance they need; and it is not the intent of the legislation to deprive needy children of assistance in order to punish their parents for neglect of their duties. Although accepting assistance involves notice to the law enforcement officials if a parent has deserted or abandoned his child, the amendment does not impose an additional eligibility requirement...Handbook of Public Assistance Administration, Part IV, §8120.

Over the twenty years and more of the existence of the NOLEO requirement, HEW has consistently held to its position that NOLEO requirements were not to be used as conditions of eligibility. The abrupt departure from that position occurred last year when the appellants and others petitioned HEW to change the

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2. The provision presently appears at 42 U.S.C. §602(a)(11).

regulation to allow the procedure as set forth in the New York statute. There had been no new expression of Congressional intent. On the contrary, in 1967 Congress amended the statute and added further NOLEO-related provisions (42 U.S.C. §602(a)(17), (18), and (22)). The legislative history of this amendment makes it clear that Congress continued to hold that the NOLEO requirement should not be an eligibility condition. (See statement of Wilbur Mills, Chairman, House Ways and Means Committee, author of the 1967 amendment 113 Cong. Rec. 23043(1967)). In 1968 Congress enacted the Work Incentive Program (42 U.S.C. §602(a)(19) and expressly provided penalties for an unjustified refusal to participate in the program. The intent of Congress was clear that participation in the work program was to be a condition of eligibility. The Court recognized this last term in its decision in New York State Department of Social Services v. Dublino, when it held that states could use work requirements as conditions of eligibility. (__U.S.__, 93 S.Ct. 2507, 2517,(1973)). The holding in Dublino is inapposite since the specific Congressional intent to use the work requirement as a condition of eligibility is not parallelled in the NOLEO area. Sixteen federal court decisions have held consistent with the Congressional intent. Additionally there have been the three United States Supreme Court affirmances. Notwithstanding the tremendous freight of these precedents, HEW changed the regulation.[3] The difficulty that HEW

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3. The only change which appears to shed light on the reversal of HEW's stance on the NOLEO requirements was a change in staffing at the Social and Rehabilitation Service, the segment of HEW which was responsible for the promulgation of the new NOLEO (continued on p. 8)

has been having lately in interpreting its own regulations has been noted by the United States District Court for the Northern District of Georgia in the case of Barron v. Saucier, __F.Supp. __, Civ. Action #17-159, decided September 27, 1973:

> Furthermore, the defendants' position is not strengthened because HEW administrators have approved their procedure. Indeed, it is difficult to understand why HEW officials are unable to interpret their own regulations. This case is the third recent example of such ineptness. E.G., Adams v. Parham, __F.Supp.__, C.A. #16041 (N.D. Ga., April 14, 1972); Carr v. Saucier, __F.Supp.__, C.A. #16-704 (N.D. Ga., March 29, 1973).

Because of the apparent conflict between the plain meaning of the statutes and regulation and the HEW interpretation thereof, the agency interpretation normally given such administrative explications cannot be followed. Griggs v. Duke Power Company, 401 U.S. 424 (1971); Morningside Lenox Park v. Volpe, 334 F.Supp. 132, (N.D. Ga., 1971). Thus, in deviating from the usual practice of affording administrative regulations the status of convincing authority, the court below acted properly. The regu-

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3. (Cont'd from p.7) regulation. At the time of the promulgation of the new regulation, Robert Carleson superintended the S.R.S. Carleson was the former Commissioner of Welfare for the State of California and was defendant in the NOLEO cases of Carleson v. Taylor, (supra) and Doe v. Carleson (unreported, N.D. Calif., July 18, 1972). The refusal of the State Department of Welfare to follow the directives of the Court in those two cases has resulted in contempt citations against the California State Welfare Department. Doe v. Swoap, #71-864 RFP, and Taylor v. Swoap, C. 69-666, RFP, N.D. Calif., filed October 26, 1973.

lation which deviated from the policies of twenty years standing, a policy which had been explicated and relied on by at least sixteen federal courts, was not convincing authority when done simply by administrative fiat. A change of this magnitude would only be warranted by the express intent of Congress.

V

RETROACTIVITY OF AWARD TO APPELLEE ANNA STUCK

A notice of appeal from the decision of the three-judge Court was filed in behalf of Anna Stuck in this matter. No separate jurisdictional statement was filed since such a statement would have simply reiterated the lengthy jurisdictional statement of each of the Appellants and since the question of retroactivity is "fairly comprised" within the questions set forth in the jurisdictional statements. Supreme Court Rule 15 (1)(c). The question of the validity of retroactive payments to welfare recipients is presently before the Court in the case of Edelman v. Jordan, #72-1410. The determination of the Court in that case should be dispositive of Miss Stuck's claim as well. The Court is referred to the excellent briefing by the Respondents and the amici setting out the arguments for retroactive grants. It should also be noted that the Court has already this term twice upheld the validity of retroactive payments in the welfare area. Carter v. Butz, #73-712, and Bermudez v. Butz, #73-5338.

Should the Court decide in Jordan that the question of retroactivity is to be determined on the facts of each case, it

should be pointed out that the recovery in the instant case would be very small. Since the matter is not a class action, recovery would be limited to the amount of the individual welfare allowance to Anna Stuck from the time that she was wrongfully denied public assistance February 20, 1973, until the time her assistance was reinstated pursuant to the order of the three-judge court October 1, 1973. Furthermore, the state has proceeded at its peril in enforcing New York Social Services Law 101-a as amended. The statute was passed during the pendancy of the litigation. Passage of the statute was secured through the efforts of the Department of Social Services. The Department was well aware that the case of Doe v. Harder, (supra) from its neighbor state of Connecticut, had held that the state's new wrinkle of terminating assistance to the mother instead of the child was a sham and suffered from the same vice as the previous method of terminating the mother and the child. At the time of the passage of the amendment, the Court had made the law in this area crystal clear in the affirmances of Juras v. Meyers, Carleson v. Taylor, and Weaver v. Doe. The state's knowledge of the infirmity of the statute is indicated by the fourth section of the bill, which states:

> The provisions of this act shall be ineffective to the extent they are determined to be not in compliance with federal law [and] regulations pertaining to public assistance and care.

The state should not be rewarded for its recalcitrant efforts to evade the law of the land. Doe v. Hodgson, (2nd Cir., May 1, 1973).

Therefore it is requested that the case be affirmed on the merits but that the order be modified to require payment of sums wrongfully withheld from Miss Stuck.

Respectfully submitted,

ONONDAGA NEIGHBORHOOD LEGAL SERVICES, INC.
ISADORE GREENBERG, of Counsel
DOUGLAS A. ELDRIDGE, of Counsel
Attorneys for Appellees
633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:
CITY OF SYRACUSE)

JEAN M. RICE, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age, and resides at 3130 Cold Springs Road, Baldwinsville, New York.

That on the 7th day of February, 1974, deponent served the within Motion for Leave to Proceed In Forma Pauperis, Motion to Affirm, and Brief in support of the Motion, upon Louis Lefkowitz, Attorney General of the State of New York, attorney for Appellant Lavine in this action, at the Capitol, Albany, New York 12224; and upon John LaParo, Esq., Chief Welfare Attorney, Department of Social Services, 600 South State Street, Syracuse, New York 13202, the addresses designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Jean M. Rice

Sworn to before me this
7th day of February, 1974.

Douglas A. Eldridge

DOUGLAS A. ELDRIDGE
Notary Public in the State of New York
Onondaga County, Term Expires March 30, 1974